No. 3015.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

United States of America,
Appellee,

vs.

Charles K. Holsman, et al.,
Appellants.

BRIEF OF APPELLEE.

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STATEMENT OF THE CASE.

The appellants in this case, through their counsel, have made a purported statement of the case at the beginning of their brief, but the statement is so short that we do not believe it gives this court a fair idea of the scope of the evidence produced before the court below.

These appellants, Charles K. Holsman and Gideon M. Freeman, were indicted, together with Henry L. Giles, Ambrose C. Sims and Otto C. Joslin, the charge

in the said indictment being that the said defendants conspired to commit an offense against the United States, to-wit: the offense of conspiring to devise a scheme and artifice to defraud and to use the United States mails in carrying out said scheme. The indictment, set out on pages 6 to 14, inclusive, of the transcript, gives the scheme and artifice in detail and sets out the overt acts alleged to have been committed in furtherance thereof. In support of the allegations in the indictment the government produced eight witnesses, a very brief resume' of whose testimony is set out in the transcript, and the government introduced in evidence, as will appear from the minutes of the court set out in the transcript, thirty-six exhibits, of which only six are set out in the transcript. The testimony of the government's witnesses and the exhibits introduced on behalf of the government showed that these appellants, during the time alleged in the indictment, were doing business as physicians in the city of Los Angeles, first at 305½ South Spring street, and later at 327½ South Spring street. It was shown that the defendant Holsman and the defendant named H. L. Giles, who was not on trial, leased the premises at 327½ South Spring street for the purpose of carrying on the business of physicians and surgeons on May 22, 1912, the lease being for a period of five years; that the business was conducted in the name of Dr. G. M. Freeman, and that Dr. Freeman was merely an employee and had no interest in the business; that Dr. Holsman visited the premises at different times and took a more or less active part in the business on these

visits; that the business was largely advertised through the newspapers, a sample of the advertising being set out on pages 81 *et seq.* of the transcript and marked Plaintiff's Exhibit No. 2. On pages 87 to 90 of the transcript is set out a stipulation relative to all of the correspondence introduced in evidence as United States exhibits, and from which it appears that the letters addressed to Dr. G. M. Freeman and introduced in evidence were actually received at this office and the answers thereto, purporting to come from said G. M. Freeman in response to said letters, were actually sent out from the office of said G. M. Freeman at 327½ South Spring street. The stipulation further admits that the preparations sent through the mails as urine and consisting of cold tea, ammonia, salt and paste, were actually received in the office of said G. M. Freeman.

The letter set up in the indictment [Transcript, page 13], and which was introduced in evidence under this stipulation, represents that Dr. Freeman subjected this supposed urine to a "careful analytical test," from which he arrived at the conclusion that the patient was suffering from a disease which he, Dr. Freeman, promised to cure upon receipt of certain stipulated amounts of money.

It was further stipulated between the parties that the symptom blank set out on pages 92 *et seq.* of the transcript (which was in all material respects similar to the ones mentioned in the said stipulation as having come from Geo. Mertens, Hamil Hall and Robert E. Judson) indicated health. The correspondence set out

in the indictment was introduced in evidence under the said stipulation, as will appear from the minutes of the court set out in the transcript and from the stipulation and from the reading of the transcript on page 98.

The indictment letter also represents that the symptom blank has been examined and that the doctor knows all about the patient's trouble and can cure it, whereas it was stipulated [Transcript page 98] that the symptom blank referred to showed the condition of a normal man.

We realize that the paucity of the transcript and the absence of the majority of the government's exhibits may somewhat prevent the court from obtaining a fair and concise view of the case from the point of view of the government, but the appellants have assigned no error upon the insufficiency of the evidence other than assignment of error No. 8 set out on page 223 of the transcript, which complains only that the evidence of the government was based upon decoy letters and therefore insufficient. Counsel in their brief make no argument at all upon the insufficiency of the evidence nor even upon the 8th assignment of error, other than that set out on pages 20 and 21 of their brief. Therefore for all the purposes of the appeal now before this court, the transcript is ample as all the assignments of error have to do with the admission of evidence and the instructions of the court.

In their brief counsel argue a number of points which are not assigned as error in their assignment of

errors. These points are designated in their brief, under No. 2, subdivisions "e," "f," "g," "h," and "i," and while we are aware that under rule 11 of the rules of this court this court will notice a plain error not assigned, still we would respectfully suggest to the court that there is no plain error in these points argued by counsel, and that there is much vice attendant upon the practice of attorneys basing a large, if not a major portion of their brief upon points not assigned as error in the assignment of errors, for the reason that if the alleged errors had been assigned in the assignment of errors the appellee in this case, or in any case, would undoubtedly see fit to include in the transcript much that would be irrelevant for the consideration of the case upon the alleged errors only included in the assignment filed.

ARGUMENT.

No. 1.

Upon the point that the court below erred in overruling defendants' demurrer to the indictment (brief of appellants, pages 5, 6 and 7) we would state that a careful reading of the indictment will show that the argument of counsel is wholly erroneous and based upon an incomplete and incomprehensive reading of the indictment. Counsel for appellants state that the indictment fails to allege, except by way of recital, the fraudulent intent of the defendants. The indictment [pages 6 to 14 of transcript] alleges that the defendants "did unlawfully, wilfully and feloniously

conspire, combine, confederate and agree together to commit an offense against the United States, that is to say, the said defendants did then and there *knowingly* (italics ours) and unlawfully conspire, combine, confederate and agree together in devising and intending to devise a scheme to defraud certain persons." So much for the charging part of the indictment. In the delineation of the scheme, among other things, it is said: "that by means of said advertisements said defendants intended to cause and induce divers persons to communicate and open correspondence with them in the name of said defendant Gideon M. Freeman, by means of the postoffice establishment of the United States, relative to their real or supposed symptoms or ailments; that when said persons so intended to be defrauded communicated with said defendants by the means aforesaid, said defendants intended to write and communicate with said persons by means of letters to be sent through said postoffice establishment enclosing a symptom blank in each of said letters, and advising each of said persons to answer carefully all questions contained in said blank, relative to his real or supposed ailments, and to send the same and a sample of such person's urine to said Freeman, who would make a thorough study and analysis of same and then would be able to treat such person as well as if he were in said Freeman's office; and that nothing would be left undone by said Freeman to restore said persons to full vigor and health, and, irrespective of any symptoms that might be disclosed to defendants by said blanks and samples of urine, and even where

said blanks and urine disclosed a normal physical and mental condition, and without any attempt by analysis of said urine or by careful examination of said symptom blank, or otherwise, to ascertain whether or not such persons were actually suffering from such a disease or any disease whatever, or believed themselves to be suffering therefrom, defendants intended, in letters to be sent to said persons through the postoffice establishment of the United States, to state to such persons, and induce them to believe, that their condition was thoroughly understood by defendants and that such persons were right in attending to their trouble at once, as such trouble, if neglected, would steadily become worse and gradually undermine the general health, wreck the nervous system, and result in the total loss of manhood of such persons, and defendants intended to state to and advise such persons in such letters to commence treatment at once, and that if such persons wished to avail themselves of said Freeman's treatment and advice, to forward to the secretary of said Freeman money to pay for a month's treatment, or if the entire three months' course of treatment was desired to send the entire amount therefor, which amount defendants intended to place at considerably less than three times the amount to be fixed for one month's treatment, which latter amount defendants intended to fix at different amounts to the different individuals; the basis upon which said amounts would be fixed and the different amounts defendants intended to so fix being to the grand jurors unknown. Said statements, representations and advice so intended to

be so made and given to said persons so to be defrauded as aforesaid, *were not intended by said defendants to be made in good faith for the purpose of ascertaining the physical and mental condition of said persons, so that defendants could in good faith furnish treatment to cure and alleviate such condition; but were intended to be made by defendants for the purpose of inducing said persons to believe they were seriously afflicted with a disease of the urogenital organs, regardless of whether said persons were so afflicted or not, and to induce said persons to send and pay money to said defendants in cases where no treatment at all, physical or mental, was needed, and to induce others of such persons to pay for more treatment than the actual physical and mental condition of said other persons so to be defrauded required."* (Italics ours.) [Transcript, pages 7 to 10.]

A fair reading of the part of the indictment above set out will convince any one that the fraudulent designs and purposes of the defendants are thoroughly described and set out in the indictment and are not to be deduced *by inference only.* Indeed, the quotation from the case of Van Gesner v. The United States, 153 Federal 53 (erroneously cited on page 6 of appellants' brief as page 706), is entirely an argument in favor of the overruling of the demurrer in this case, rather than the sustaining of the same.

We have carefully examined the cases cited by counsel in support of their argument on the demurrer, and while in some of the cases cited demurrers have been sustained, nevertheless, in no case cited has a demurrer

been sustained to an indictment which charged with the particularity with which this indictment charges the fraudulent intent of the defendants. The case of Hughes v. United States, 231 Federal 50, is a case of the identical kind now before this court. In that case the demurrer was overruled, and the court said, in part:

"The demurrer criticizes the indictment upon the general ground that it does not set out an offense against the laws of the United States. The indictment contains four counts. The first charges a conspiracy against all the defendants to violate section 215 of the Penal Code. The remaining three all charge the same defendants with the violation of that section. It is contended by the demurring defendants that the counts fail to show the devising of a scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent representations or promises, in that it is not charged that the defendants were not qualified to administer the treatment they promised to administer, nor that they did not, in fact, intend to administer such treatment, when paid therefor. It is true that the indictment does not aver that the defendants were not so qualified, nor that they promised with the then intention of not furnishing any treatment, though paid for so doing. The scheme relied upon by the government is a different one. The fraud is alleged to have consisted in soliciting and receiving money from patients, intending to furnish medicine or treatment therefor, without regard to the needs of the patient for that or any treatment, without making any

diagnosis such as would inform them as to the need of the patient for any or for what treatment, and with the intent to receive the money, though they knew that the patient paying it had no need of any treatment, or of the treatment to be furnished in consideration of it, or had purposely refrained from informing themselves of his needs in those respects. In other words, the indictment charges the defendants with having devised a scheme to solicit money from patients for promised treatment, not intending to furnish treatment in good faith, but only as a pretext for securing the patient's money. Whether the treatment or medicine furnished was of little or much value intrinsically, in this view of the scheme, was of no consequence. We think the scheme alleged to have been devised by the defendants was one included within and prohibited by section 215 of the Code."

Therefore we would respectfully submit that the lower court was correct in its ruling upon the demurrer.

We will not take up in the order argued in the brief of appellants the alleged errors upon the admission and rejection of testimony and evidence.

No. 2.

(a) This alleged error is included in the assignment of errors and is set out on page 224 of the transcript as assignment No. 11. Counsel in their brief on pages 9 and 10 set out the testimony of Dr. Fuller. Counsel complains that they were restricted in their cross-examination of Dr. Fuller to a degree that constitutes error.

But careful reading of Dr. Fuller's testimony as set out in the transcript and brief of appellants discloses that upon direct examination he in no manner touched upon the matters concerning which counsel desired to cross-examine him. The scope of cross-examination is largely a matter for the exercise of discretion by the lower court, but one of the cardinal principles of cross-examination is that it must be confined to those matters touched upon in direct examination. In this instance Dr. Fuller was an employee of the office at 327½ South Spring street during the time the conspiracy was in progress, and it was to be presumed that he would be an unfavorable witness to the government. It was the privilege of the prosecution, and exercised as such in this case, to limit the direct examination to certain matters only so that counsel for the defendants would be unable to substantially make Dr. Fuller their witness by their cross-examination of him. It was upon this theory that the court sustained the objection to the cross-examination on the ground that it was not proper cross-examination. The objection was also sustained on the ground that it was incompetent, irrelevant and immaterial as to how the offices were equipped as no allegation in the indictment charges that there was any lack of equipment or that there was to be any personal contact with the persons to be defrauded named in the indictment. The defendants might well have been able to treat persons in their office and yet have been guilty of the scheme and artifice to defraud as laid in the indictment.

In any event, if the counsel for defendants had de-

sired to ascertain the equipment of the said office, Dr. Fuller was available to them and they could have made him their own witness. They did not pursue this course and therefore they are not in any position to complain now of the action of the court below in exercising his discretion in limiting the cross-examination of this witness.

As to the three cases cited on page 10 of appellants' brief, counsel do not in any manner suggest just how these cases support the contention set up in their brief nor what parts of the opinions in these cases are relevant. We have been unable to discover wherein these cases support the view taken by counsel of the action of the lower court in this matter.

(b) The argument of counsel for appellants under this letter has to do with the admission of a certain affidavit set out on pages 78 and 79 of the transcript. The execution of this affidavit is admitted, and being executed by the defendant G. M. Freeman, was certainly competent as to him. This is an affidavit required by the laws of the state of California and bears the file marks of having been filed before the State Board of Medical Examiners of the state of California on September 11, 1911. The government had established the association of Drs. Freeman and Holsman in 1912 by the witness Fuller. It is always permissible for the lower court to admit evidence in a conspiracy case of association of the conspirators and if such evidence is not connected with the conspiracy it may be stricken from the record upon a proper motion. At the close of the government's case no motion was made

on behalf of the defendant Holsman to strike this affidavit from the record upon the ground that it had not been properly connected with him. The undisputed law of conspiracy is that the statement of any conspirator is binding upon all other conspirators after the establishment of the conspiracy is proved. Counsel for defendants not having made a motion to strike this affidavit from the record, the court, upon its own volition, in charging the jury, said:

"The court further instructs you that, while the acts or declaratioins of a co-conspirator cannot prove the existence of the conspiracy itself, any act or declaration done or made by one of the conspirators during the existence and in furtherance of the unlawful combination when proven, is not only evidence against him, but is evidence against the other conspirator, who, if the combination be proved, is as much responsible for such act or declaration as if done or made by himself.

"You must not, however, permit yourselves to use against either defendant, anything said or done outside the presence of such defendant, unless you believe from the evidence, beyond a reasonable doubt, that at the time the things were said or done a conspiracy existed between the party saying or doing the things and the defendant to be effected thereby. In such a case it is only those things said or done in furtherance of the objects of the conspiracy which are chargeable against the other member or members of such conspiracy." [Transcript, pages 199 and 200. Instruction X.]

We would therefore suggest that there was no error in the admission of the affidavit and that if there were

any irregularity in its admission it was cured by the said instruction.

(c) This alleged error has to do with the introduction into the evidence of two bound volumes of the Los Angeles Examiner, being for the months of July and August, 1912. The stipulation set out on page 87, *et seq.*, of the transcript states in part:

"It is further stipulated that the person writing said letters was guided by the language contained in an advertisement circulated in the Los Angeles Examiner July 14, 1912, over the name of Dr. G. M. Freeman and other advertisements appearing in newspapers published and circulated in said city of Los Angeles." [Transcript, page 88.]

The advertisement appearing in the issue of July 14, 1912, is set out in the transcript as Plaintiff's Exhibit No. 2 of page 81, *et seq.*, of the transcript, and was introduced in evidence by stipulation. The issues of the Examiner complained of were introduced in evidence only so far as they contained advertisements of a similar nature to that introduced in evidence as Plaintiff's Exhibit No. 2. Therefore, it having been proved that Exhibit No. 2 was authorized by defendant Freeman, that was a sufficient foundation to admit similar advertisements which had occurred through a number of other editions of the same paper. The defendant Freeman, when placed on the witness stand in his own behalf, did not deny putting these advertisements in the paper, but, on the other hand, admitted that he did the advertising. [Transcript, page 184—cross-examination.]

The case of Diggs v. United States, 220 Federal 541, paragraph one of the syllabus holds that where a fact in the knowledge of a defendant is not denied when the defendant takes the stand in his own behalf, it shall be considered most strongly against him. Applying this principle to the situation complained of, it, in effect, amounts to an admission by the defendant Freeman that he was the author of all the advertisements introduced into evidence and this, together with his own testimony on page 184 of the transcript, would preclude any possibility of error in the admission of this evidence.

(d) The argument under this letter is apparently based upon assignment of error No. 8, page 233 of the transcript. The objection of counsel, as set out in their brief, page 20 and 21, is that these letters were not competent in that there was no proof that the same were written by Dr. G. M. Freeman, or that he authorized the same to be written. The stipulation set out on pages 87, *et seq.,* of the transcript, admits the receiving in the office of Dr. Freeman of all of the letters introduced in evidence by the United States purporting to be sent to said Dr. G. M. Freeman, and that the answers to said letters introduced in evidence on behalf of the United States purporting to be from Dr. G. M. Freeman were actually sent out from the office of Dr. Freeman at 327½ South Spring street. The stipulation waives every objection except that of incompetency. Some of the letters were those set out in the indictment and others were of like character as is stated in the stipulation.

Therefore they were absolutely competent and material in the case, and it was left to the jury to decide from the circumstances surrounding the receiving and answering of these letters whether or not the same was done with the knowledge of these appellants. Any fact may be proven by circumstances as well as by direct evidence, and the circumstances in this case were so strong that the letters were written with the knowledge of these appellants that the jury found them guilty.

Now, as to the point that these were decoy letters, we would state that the letters written to the office of Dr. Freeman, as stipulated in the transcript, were letters which were mailed at the instance of postoffice inspectors in an endeavor to discover whether or not the postal laws were being violated. It will be remembered that Dr. Freeman was doing extensive advertising and that the advertisement set out on pages 81, *et seq.*, of the transcript, repeatedly urged correspondence and stated in part:

"Write me a full description of your symptoms and trouble if unable to call. All dealings are confidential. Call or write today for free consultation."

Undoubtedly these letters so caused to be mailed by the postoffice inspectors were decoy letters, but the answers to them emanating from the office of Dr. Freeman were in no sense decoy letters, and, inasmuch as none of the defendants in the case were aware of the character of the letters sent to the office of Dr. Freeman, they cannot now be heard to complain that they are guiltless because of the fact that the postoffice

inspectors chose this method of discovering their culpability.

The case of Hughes v. United States, 231 Federal 50, heretofore cited, is a case wherein all of the evidence introduced at the trial was of the identical character of that used in this trial, to-wit: decoy letters from postoffice inspectors and answers thereto from the office of the defendants, and the court in that case upheld such procedure in the following language:

"The defendants N. A. Hughes, T. W. Hughes, August Marable, J. F. Allen, and Edward Parlan are shown by the government's evidence to have been physicians and principals in the business that was being conducted at the two locations mentioned as the seats of the conspiracy, and the jury were authorized to infer from the evidence that these defendants were responsible during the period covered by the years 1912 and 1913 for whatever was being done on the premises at each location, and that they shared or were to share in the profits of the transactions knowing their actual character. It was also open to the jury to infer from the evidence that the purpose of the business that was being conducted during the period mentioned at those places, was not the *bona fide* treatment of disease, but a scheme to secure money from patients with no purpose to treat them in good faith as promised, but merely as a pretext for taking the money solicited. The correspondence between the inspectors and the defendants, introduced in evidence, was of a character, which justified the jury in drawing the inference of bad faith and fraud, if they saw fit.

The fact that only fictitious transactions, based on decoy letters written by inspectors, were in evidence, and that no money is shown to have been received by the defendants, did not prevent the jury from inferring the existence of the conspiracy charged in the first count or the fraudulent scheme charged in the remaining three. We think there was no error in submitting the cases of these defendants to the jury." (231 Federal 54, 55.)

The cases are almost innumerable in which the courts have decided that where there was reason to believe that the postal laws were being violated, it was proper for the postoffice inspectors to test the suspected persons, by the use of test letters, and the fact that counsel for appellants have been unable to cite a single case to this court in support of their position that such correspondence as this is not sufficient to sustain a verdict of guilty, is evidence enough that the courts have uniformly looked upon it as a justifiable and legal manner of ascertaining and proving violations of the postal laws.

(e) This is an alleged error not assigned in the assignment of errors and we have heretofore called the court's attention to the difficulties attending an argument based upon an alleged error not included in the assignment of errors. However, there is no plain error in the ruling of the court complained of under the letter "e". The objection apparently was to the qualifications of Dr. Frank L. Cunningham in that he was an osteopathic physician and that he was not per-

mitted, under the laws of the state of California, to administer medicines. Counsel in their brief, however, have not undertaken to point out any law of the state of California prohibiting an osteopath from treating the diseases concerning which Dr. Cunningham was testifying, and we are frank to say that we do not believe there is such a law. We have investigated the matter and find no such provision of any law of the state of California. The testimony was admissible to show that the diseases in question could not be treated successfully by osteopathy without personal contact between physician and patient.

(f) This also is an alleged error not assigned in the assignment of errors. The answer to the question propounded to Dr. Whitman, set out on page 23 of the brief of appellants, is not set out in their brief. They complain in their brief that it would be impossible for the doctor to correctly answer the question propounded as it called for conclusions which he was unable to give. The doctor's answer to said question, set out on page 101 of the transcript, was as follows:

"While in that paragraph (referring to the symptom blank) many of those things, of course, the patient would be able to tell but he would not be able to tell whether he had clap or acute gonorr*hea* and on reading the second list as to gleet or chronic gonorr*hea* or stricture or of the third list as to syphilis or blood poison I will answer your question as to the patient's ability to decide. It is not possible to diagnose gonorr*hea* without the use of a microscope. The positive diagnosis of syphilis is the blood test called the

Wasserman test. The ordinary layman by self-examination cannot tell whether or not he has gonorr*hea* or syphilis; that is the ordinary layman who is not familiar with the microscope. The only way to distinguish these diseases is the microscope for the gonorr*hea* and the Wasserman test for the syphil*lis*,—the two diseases are different." [Transcript, pages 101 and 102.]

We respectfully submit that there is nothing in the answer which in any wise oversteps the rules of evidence in regard to expert testimony.

Counsel also complain of the following question which was asked Dr. Whitman as an evpert: (The qualifications of Dr. Whitman as an expert are apparently unquestioned)

"Now, doctor, would you say from your experience in doctoring patients that it would be possible to successfully treat patients through the mails upon questions answered by them, without personal contact with the patient in the diseases, the so-called genito-urinary diseases?" (Brief of appellants, page 24.)

The answer to this question was as follows:

"A doctor who reads the patient's description of what he had could not tell what the patient had without a personal examination." [Transcript, page 102.]

We do not follow counsel in their argument upon this point as, beyond any doubt, if it were impossible for a physician to determine from a patient's own diagnosis of his symptoms what the condition of the

patient was, then it would certainly be evidence of bad faith on the part of the person so representing to the public that he could treat patients afflicted with genito-urinary diseases without making a personal diagnosis.

(g) This alleged error is also unassigned in the assignment of errors, and has to do with the refusal of the court to allow postoffice inspector Webster to testify on cross-examination over the objection of counsel for the government as to whom he interviewed in the preparation of the evidence in this case. Obviously the good faith of these appellants could neither be established nor impeached by postoffice inspector Webster's conduct in interviewing any one concerning this case. The question propounded, and to which the court sustained an objection, was as follows:

"Q. How many people have you, in your investigation which you have testified about, talked to personally or written to in regard to the treatment received from that office?" [Transcript, page 106.]

The number of people Webster interviewed in this case has absolutely nothing to do with the intent of the defendants to defraud which is the material issue in the case, and the court was correct in his ruling in denying counsel the right to cross-examine Mr. Webster in any such manner.

(h) This alleged error also is unassigned in the assignment of errors. This is similar to objection "f." Counsel have cited no authority in support of their position on either of these points, and we think we are justified in the assumption that had there been

authority to support their position they would have cited the same.

(i) This alleged error also is unassigned in the assignment of errors. Dr. Freeman, on page 110, *et seq.*, of the transcript, was permitted to describe the office at 327½ South Spring street and its equipment, but when asked to compare this equipment with that of other offices the government objected and the objection was sustained. Counsel, in their argument, state:

"It will be noted that the scheme charged was to defraud the people; that they would cure certain diseases in a certain way—then, was not the fact that they were fully equipped in the office for the treatment of such diseases by the use of a static machine and a supply of medicines, etc., competent as bearing on the question of their good faith in being in the business? We think this, on the ordinary principle of reasoning, is sound, and that the court erred in not permitting this examination." (Appellants' brief, page 27.)

Counsel were permitted to prove all of the points mentioned in their argument in this alleged error, and it was only the comparison with other offices that was ruled out by the court.

(j) Under this head, counsel discussed what they term "the most serious error on the question of admission and rejection of evidence."

We desire to call this court's attention to the artful manner in which counsel for appellants endeavored to mislead the court below and the trial jury as to the

materiality and the weight of letters, the rejection of which as exhibits form the basis of this assignment of error. It will be seen from portions of the transcript quoted in our argument hereafter that counsel well understood that the letters were not admissible if the truth as to the time, place and circumstances under which they were written and received by the defendant Freeman were disclosed. As will appear, the letters were written by Doctor Freeman and received by him after he had left the office at 327½ South Spring street and the employ of his co-conspirators and had ceased all association with them and opened an office of his own at Third and Broadway, in the city of Los Angeles. The conspiracy then, so far as the same might be affected by any acts of Freeman, was at an end. The extracts of the testimony hereafter quoted show that counsel, fully realizing this, resorted to a systematic scheme of evasion in their method of offering this testimony and their discussion thereon in the court below and, now, in their argument before this court. Counsel perhaps felt driven to this extremity by reason of their realization of the weakness of their case and by the belief that if they could not predicate error upon the action of the trial court in denying the admission of these letters then their case would be lost.

To begin with, the defendant Giddeon M. Freeman testified in direct examination, on page 110 of the transcript, that he knew the defendants Drs. Holsman, Giles and Joslin and Mr. Sims and that he was connected with the office at 327½ South Spring street in 1912 where he worked on a salary for Drs. Holsman,

Joslin and Giles. On page 112 of the transcript (bottom of the page) he testified that he left the employ of Drs. Holsman, Giles and Joslin the first week in April, 1913, and opened an office at Third and Broadway. Dr. Frank C. Fuller testified, on page 73 of the transcript, that Dr. Freeman left the offices at No. 327½ South Spring street some time in April, 1913. The indictment charges that the conspiracy was between Charles K. Holsman, Henry L. Giles, Gideon M. Freeman, Ambrose C. Sims and Otto C. Joslin. Obviously the conspiracy alleged in the indictment could in no wise be affected by the act of any of the conspirators after the termination of the conspiracy, and what Dr. Freeman did individually after the first week in April, 1913, when he terminated his connection with the office at 327½ South Spring street and opened an office of his own at Third and Broadway, could not in any wise affect or throw light upon the conspiracy between himself and the other conspirators named in the indictment while they were associated together at 327½ South Spring street.

On the trial of the case before the court below, counsel for defendants, Mr. Stone, asked Dr. Freeman the question:

"Q. Did you preserve, and have you your correspondence for the year 1913?

"A. I have, yes.

"Mr. Stone: Do you want to examine this?

"Mr. Moody: Is this correspondence of the office at Third and Broadway?

"Mr. Stone: Yes.

"Mr. Moody: No, I don't want to examine it. It has nothing to do with this case.

"Mr. Stone: Q. I show you here, doctor, a number of letters and replies in May, 1913, relating to the business of the office. Will you kindly examine that exhibit for the month of May, 1913, and state whether or not those are the original letters received at the office, and copies of replies given by you in regard to any business of the office or the treatment of any patient?

"Mr. Moody: Is this the office at Third and Broadway?

"Mr. Stone: That is for the witness to say, where it is. It is immaterial where it was. The conspiracy is alleged to be January 1st, 1912, and from that time on, continuous, Your Honor.

"Mr. Moody: During the times mentioned in the indictment?

"The Court: Well, this question, Mr. Moody, is preliminary. Haven't you examined those documents?

"A. Yes, sir, I know them.

"The Court: Well, you can answer the question then.

"A. Yes, sir, these are parts of my records.

"Q. By Mr. Stone: That is for that month; is that correct?

"A. Yes, sir.

"Mr. Stone: We offer those in evidence, if Your Honor please." [Transcript, pages 113 and 114.]

It will appear from this portion of the transcript that the letters offered in evidence were from the office

at Third and Broadway operated in the month of May, 1913, by Dr. Freeman after he had severed his connection with the other defendants in this case.

It will also be observed that Mr. Stone was very reluctant to bring before the court or the jury the location and the personnel of the office from which this correspondence originated. In his argument on page 115 of the transcript, Mr. Stone never once informed the court that these letters were the letters of Dr. Freeman from his own office at Third and Broadway after he left the employ of his co-conspirators at 327½ South Spring street. And on page 116 of the transcript, near the bottom of the page, he said to the court:

"Can it be stated that they can pick out a few decoy letters that were sent to *them*, and to which answers have been made, without *their* knowledge, as the evidence appears here, and then all the letters pertaining to *their* business showing *they* were doing an honest business, can be cut out?" (Italics ours.)

Which is, in effect, an allegation by Mr. Stone that these letters he was offering in evidence were the letters of all of the defendants or the replies to letters sent out by the defendants. On page 117 of the transcript, the following conversation between Mr. Stone and the court is set out:

"The Court: As I understand you, Mr. Stone, these letters were written by this witness to patients of his?

"Mr. Stone: I will correct Your Honor in this, these letters are letters that he received from different people with whom he was dealing, and copies of his replies.

"The Court: When he was in *the* office?

"Mr. Stone: Yes, sir.

"The Court: Under the employment of *Holsman?*

"Mr. Stone: Well, while he was in the office. His name is signed to them.

"The Court: I say, while he was in the employment of Holsman?

"Mr. Stone: *Yes, sir,* while he was in *the* office anyway. It does not make any difference whose employment he was in.

"The Court: Well, I think it does make a difference in any event." [Transcript, page 117.] (Italics ours.)

It will be seen from this conversation that when the court asked Mr. Stone if these letters were received by Dr. Freeman while he was in *the* office, Mr. Stone answered: "Yes, sir." When the court further interrogated him "under the employment of Holsman?" Mr. Stone evaded a direct answer and stated: "Well, while he was in the office," and the court again asked Mr. Stone, as follows: "I say, while he was in the employment of Holsman?" and Mr. Stone answered, "Yes, sir, while he was in the office, anyway." Thus again it will be seen that Mr. Stone sought to conceal the fact that these letters emanated from Dr. Freeman's individual office at Third and Broadway after he severed all connections with the office at 327½ South Spring street, when his client testified on direct examination that he was no longer in the employ of Dr. Holsman at the time of this correspondence. On page 118 of the transcript, Mr. Stone said to the court, in part:

"The indictment charges they conspired to defraud various people by the use of the mails, and we want to show by every man that had correspondence with him that he never intended to defraud him; that the letters we received from those people, and every letter sent to them in every instance stated they must come to the office for examination, in contravention of the things alleged in the indictment."

Whereas the indictment never related or pretended to relate to Dr. Freeman's business at Third and Broadway. The court thereupon said: "It seems to me, Mr. Stone, they are self-serving declarations and not admissible"; which in itself was ample ground for the refusal of the admission of this correspondence, in addition to the further ground that it was totally incompetent, irrelevant, and immaterial and without the issues as confined in the indictment.

At the bottom of page 118, Mr. Stone stated:

"Mr. Stone: Yes. We offer first, if Your Honor please, we might offer them as one exhibit, a series of letters and copies received from patients, people with whom *these defendants* were dealing in May, 1913, as Defendant's Exhibit No. 1, there being about 30 or 40 letters." (Italics ours.)

Whereas he well knew, and the transcript abundantly shows, that the letters offered in evidence were not the letters received from patients with whom *these defendants* were dealing in May, 1913, but were letters from patients with whom Dr. Freeman individually was dealing from his office at Third and Broadway

after he had severed all connections with the other conspirators mentioned in the indictment.

On page 119 of the transcript, the government made another objection to these exhibits which was, in our opinion, as good as our former objections, which was that they were privileged communications, namely, communications between a doctor and his patients in connection with their private diseases and the doctor had no right to divulge such correspondence without the privilege being waived by the writers of the letters. This objection was also sustained by the court.

Then follows in the transcript, pages 119, *et seq.*, the letters offered by Mr. Stone, and a casual glance at the date of every one of them will show that they are all dated subsequent to the severing, by Dr. Freeman, of his connection with his co-conspirators. And it will be further noted that where Dr. Freeman's address is given in any of these letters, it is 254 South Broadway or the corner of Third and Broadway and not 327½ South Spring street.

On page 179 of the transcript, at the bottom of the page, the following proceedings are set out:

"Mr. Stone: We next offer in evidence the entire correspondence of the office for June, 1913, being original letters received from patients and the copies of the replies, showing the manner in which the office was conducted.

"Mr. Moody: May I ask, Mr. Stone, if you will include in your offer—You say 'from the office.' Will you include in your offer from what office, giving the location of the office?

"Mr. Stone: Well, I deem the location of the office immaterial on this matter, if they were doing the things you claim. Personally I don't know, but they were from Los Angeles.

"The Court: I would suggest, gentlemen, I would not think the location of the office is material.

"Mr. Moody: The only reason I had in making that suggestion was that this witness testified he severed his connection in the spring of 1913 and started in an office of his own, and manifestly what he did by himself would have nothing to do with the conspiracy.

"The Court: Of course, that is right, too.

"Mr. Moody: That is the reason I wanted him to say whether it was from his own office, or the office of the other parties." [Transcript, pages 179 and 180.]

Again, it will be seen that despite the efforts of counsel for the government to establish the origin of these letters, Mr. Stone again evaded the question and refused to put in the record the office from which this correspondence originated. And, in the offer by the counsel for defendants of all of the letters included in Exhibits 1 to 8 he did not at any time disclose to the court willingly the fact that these letters were the private correspondence of Dr. Freeman.

So much for this correspondence before the lower court.

Counsel for appellants in their brief on page 34 argue, in part, as follows:

"The *defendants* identified, by the defendant Freeman, while on the witness stand, *their* correspondence

for several months beginning with May, 1913, the same being office copies of the letters *they* sent out, and the original replies thereto, for the purpose of showing the nature of the business transacted by *the defendants,* which was charged to be fraudulent over this period of time." (Italics ours.)

It will be seen that here again counsel argue that the correspondence was that of *the defendants,* being office copies of the letters *they* sent out, which was entirely the opposite from the real situation.

We do not think it is necessary to further discuss this assignment of error nor to cite authorities in support of the ruling of the court below.

No. 3.

Under this number counsel for appellants discuss the instructions—both those refused and those given by the court below.

On page 44 of their brief, counsel begin their argument on the instructions refused. They complain that the first requested instruction was erroneously refused. The first instruction requested was as follows:

"I instruct you in this case that the gist of the allegations against the defendants is a conspiracy and the doing of an act or acts, to-wit, the mailing of letters set out in the indictment, in furtherance of the conspiracy.

"You cannot find the defendants, or either of them, guilty of a conspiracy in the case, even though you believe such has existed as charged in the indictment, unless you further believe from the evidence, beyond a

reasonable doubt, that the defendants, or one of them, mailed or caused to be mailed the letters, or one of the letters, set out in the indictment, in furtherance of the alleged conspiracy; because a conspiracy under the United States laws is not a crime, though it is an agreement or understanding to do an unlawful act or acts, unless the overt act or one of them alleged in the indictment is actually committed by the defendant, or one of the defendants, after the conspiracy is formed and in furtherance thereof, and hence, unless you believe from the evidence in this case, beyond all reasonable doubt, that the defendants had entered into a conspiracy, as alleged in the indictment, and further, that the defendants, or one of them, in furtherance of said conspiracy, actually mailed, or actually caused to be mailed, the letters, or one of them, set out in the indictment, then it will be your duty to acquit the defendants."

The court instructed the jury substantially as requested in this instruction by counsel for appellants in instructions 5, 6 and 9 set out on pages 196, 197 and 199 of the transcript.

Requested instruction 2, the refusal to give which counsel discuss on page 45 of their brief, was amply covered in instruction No. 10, transcript, page 199, given by the court, which reads as follows:

"The court further instructs you that, while the acts or declarations of a co-conspirator cannot prove the existence of the conspiracy itself, any act or declaration done or made by one of the conspirators during

the existence and in furtherance of the unlawful combination when proven, is not only evidence against him, but is evidence against the other conspirator who, if the combination be proven, is as much responsible for such act or declaration as if done or made by himself.

"You must not, however, permit yourselves to use against either defendant, anything said or done outside the presence of such defendant, unless you believe from the evidence, beyond a reasonable doubt, that at the time the things were said or done a conspiracy existed between the party saying or doing the things and the defendant to be affected thereby. In such a case it is only those things said or done in furtherance of the objects of the conspiracy which are chargeable against the other member or members of such conspiracy."

We have before cited this instruction relative to Government's Exhibit A-1. discussed in the brief of counsel for appellants in point No. 2, subdivision b.

Requested instructions 3, 4 and 5 were nothing more or less than an unwarranted endeavor to bring this case within the rule laid down in the cases of Woo Wai v. United States, 223 Federal 412, and Sam Yick, *et al.*, v. United States, 240 Federal 60, in both of which cases this court took the view that the government officers took such an active part in the conspiracy itself that it would be against public policy to sustain a conviction thereon.

In the case at bar, the postoffice inspectors were never known to the defendants as officers, or otherwise,

and the decoy letters were used merely for the purpose of ascertaining whether or not the law was being violated.

This procedure has uniformly been upheld by the Federal courts. A few of the cases in which convictions have been sustained on such test letters as these are as follows:

Rosen v. United States, 161 U. S. 29;
Price v. United States, 165 U. S. 311;
Andrews v. United States, 162 U. S. 420;
Grimm v. United States, 156 U. S. 604;
Montgomery v. United States, 162 U. S. 410;
Scott v. United States, 172 U. S. 343;
Goldman v. United States, 220 Fed. 57;
Hughes v. United States, 231 Fed. 50. Cited at length on this point above.

In the Goldman case, *supra,* the court said:

"There is another objection to these letters which is deserving of attention. The letters were decoys and were written at the instance of a postoffice inspector. The writer of the first letter was not in the employ of the government, though the writer of the other was. The letters bore the address called for in the advertisement, were duly stamped, and the inspector placed them in box 14, Station D. The superintendent of the station, pursuant to the request of the inspector, notified Goldman by telephone that two letters were there. Goldman went there to the postoffice and took the letters from the box, opened and read them, and as one of the witnesses said, "was in the act of tearing up the envelopes" when the officer arrested him. If

these officials adopted and pursued this course upon reasonable grounds to suspect Goldman of misusing the mails, their conduct was under well-settled principles, justifiable, and the offense was committed; if no such grounds existed, neither their course nor the conviction can be sanctioned. United States v. Wright (D. C.), 38 Fed. 106, 109, per Brown and Jackson, J. J.; Grimm v. United States, 156 U. S. 604, 609, 610, 15 Sup. Ct. 470, 39 L. Ed. 550; Goode v. United States, 159 U. S. 663, 669, 16 Sup. Ct. 136, 40 L. Ed. 297; Rosen v. United States, 161 U. S. 29, 42, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; Montgomery v. United States, 162 U. S. 410, 411, 16 Sup. Ct. 797, 40 L. Ed. 1020; Andrews v. United States, 162 U. S. 420, 423, 16 Sup. Ct. 798, 40 L. Ed. 1023; Price v. United States, 165 U. S. 311, 315, 17 Sup. Ct. 366, 41 L. Ed. 727; Hall v. United States, 168 U. S. 632, 637, 18 Sup. Ct. 237, 42 L. Ed. 607; Scott v. United States, 172 U. S. 343, 349, 350, 19 Sup. Ct. 209, 43 L. Ed. 471; Bates v. United States (C. C.), 10 Fed. 92, 94, 95, per Drummond, C. J.

"The evidence tends to justify the course taken by the postoffice officials; in other words, it seems to have been an effort to detect, and not to induce commission of a crime. In the interval between the publication of Goldman's advertisement and the preparation of the letters, the inspector had been told of Goldman's purposes. During that interval the woman who wrote the first letter set out in the statement had conversed with Goldman on the subject of his scheme, and he had told her just what it was. This

occurred for the most part in the presence of a third person, a man, and the man and woman testified at the trial, without objection, that Goldman told them that he had received 10 or 12 letters in answer to his advertisement, though Goldman testified that he said they were applications, not letters. It was from the man, who was present at the interview, that the inspector received his information. In view, then, of the verdict, we cannot say that Goldman's acts of taking and receiving the two letters in issue were any the less an offense because of the fictitious character of the letters. It was not necessary, in order to establish the offense, to show that the nature of the letters so received was such as effectively to aid in working out Goldman's scheme. It was enough if, having devised his scheme, he received the letters with the purpose of thereby executing or attempting to execute the scheme. Durland v. United States, 161 U. S. 307, 315, 16 Sup. Ct. 508, 40 L. Ed. 709; Weeber v. United States (C. C.), 62 Fed. 740, 741, per Brewer, Circuit Justice; O'Hara v. United States, 129 Fed. 551, 555, 64 C. C. A. 81 (C. C. A. 6th Cir.); Lemon v. United States, 164 Fed. 953, 957, 958, 90 C. C. A. 617 (C. C. A. 8th Cir.); Walker v. United States, 152 Fed. 111, 115, 81 C. C. A. 329 (C. C. A. 9th Cir.)." (220 Federal 62, 63.)

It will thus be seen that the case at bar is substantially different from the Sam Yick and the Woo Wai cases cited by counsel for appellants wherein the government officials participated in the conspiracy to such a degree that it was held by the court that the defend-

ants could not be charged with having originated the scheme.

The stipulation set out on page 87, *et seq.*, of the transcript is in part as follows:

"It is further stipulated that the person writing said letters was guided by the language contained in an advertisement circulated in the Los Angeles Examiner July 14, 1912, over the name of Dr. G. M. Freeman and other advertisements appearing in newspapers published and circulated in said city of Los Angeles." [Transcript, page 88.]

Thus the letters of the postoffice inspectors were merely test letters to discover whether or not the business carried on through the mails by the defendants in pursuance of their advertisements set out as Plaintiff's Exhibit No. 2, page 81, *et seq.*, of the transcript, was a legitimate or an illegitimate business.

Instructions 12 and 13, given by the court and set out on pages 200 and 201 of the transcript, correctly state the law as applicable to this case. Requested instruction No. 5, which was refused by the court, is hardly a correct statement of the law regarding the use of decoy letters. Insofar as it is a correct statement of the law it is amply covered in instruction No. 12, given by the court and set out at page 200 of the transcript, wherein the court said:

"It is lawful that what is known as decoy letters, such as the letters sent by the postoffice inspector in this case for the purpose of procuring an answer from the defendants, or one of them, may be used for the

purpose of ascertaining whether the person addressed is engaged in the commission of a criminal offense against the laws of the United States. If at the time the said decoy letter or letters were mailed to the defendants, or one of the defendants, the said defendants were engaged in the criminal practice charged in the indictment, and the defendants in response to said alleged decoy letters, mailed one or both of the letters set forth in the indictment in answer to such decoy letters, or either of them, in order to execute or carry out such conspiracy, or in an attempt so to do, then the use of such decoy letters and the answers thereto can lawfully be received as evidence to prove said conspiracy."

This instruction is thoroughly in accord with the Hughes case, *supra*.

Requested instruction No. 7, while not given in the precise form requested by appellants, was sufficiently covered in the charge given by the court, particularly in instruction No. 10, set out at page 199 of the transcript, and instruction No. 8, set out on page 198 of the transcript, and that part of instruction No. 3, given by the court, which reads as follows:

"Before you can convict either of the defendants it must be shown that he conspired with one of the other defendants named in the indictment." [Transcript, page 196.]

and instruction No. 6, on page 197 of the transcript.

Instruction No. 9, set out on page 199 of the transcript, sufficiently covers that portion of requested in-

struction No. 7 relative to what constitutes responsibility for the mailing of letters in furtherance of the conspiracy.

What is said in reference to requested instruction No. 7 is equally applicable to requested instructions No. 9 and 11.

No. 4.

Under this number counsel for appellants discuss the instructions No. 12 and 13 given by the court. They argue that instruction No. 12 is inconsistent, contradictory and misleading, particularly because the court instructed the jury that the "conspiracy with which the defendants are charged must be proven to exist independently of any inducement to enter therein by any government official" and also "in other words, if the conspiracy existed it does not matter what the government officers did in order to procure evidence to prove it." These statements are not contradictory in any manner nor are they misleading.

The letters sent by the postoffice inspectors are admitted in the stipulation set out in the transcript to have been "guided by the language contained in advertisements circulated in the Los Angeles Examiner," and therefore were nothing more or less than a test to discover whether or not a conspiracy to violate the laws of the United States was being operated, and this was distinctly upheld as a proper proceeding to discover whether such a conspiracy were in progress or not in the Hughes case, *supra*. The evidence in the transcript does not disclose that the officers acted

contrary to the established rules laid down in the cases heretofore cited as authorizing decoy letters, and therefore, under the facts of this case, the instruction, "it does not matter what the government officers did in order to procure evidence to prove it," was not erroneous.

In their argument on instruction No. 13, given by the court, counsel base their argument upon an entirely erroneous premise, namely, that the government officers induced the commission of this crime. The instruction of the court, "you are instructed that the fact that the letters alleged in the indictment were in reply to such decoy letters is no defense in this action," is a correct statement of the law under the decisions above set out, and answering such letters does not constitute an inducement of the crime by the post-office inspectors. Therefore there is no conflict between these two instructions.

Again counsel are mistaken in their argument that the decoy letters were the only evidence in the case relied on by the government. The advertisement introduced in evidence as Plaintiff's Exhibit No. 2 was a very material and important point relied on by the government, in that in its promises it was so extravagant that it immediately invited suspicion that it was nothing more or less than a bait to catch the unwary and unsophisticated. The Hughes case, *supra,* held that decoy letters and answers alone were sufficient, while in this case we have other evidence of sufficient strength to warrant a jury in believing, when taken with the answers to the decoy letters, that the con-

spiracy was established independently of the decoy letters.

The argument of counsel, on page 51, *et seq.*, of their brief, that the court erred in instructing the jury that "if a person by so responding to such decoy letters violated the law of the United States," etc., in that it was not a question of whether or not the response to the decoy letters violates the law, but whether or not there is a criminal conspiracy, is unsound for the reason that the court had theretofore instructed the jury that a material and necessary part of the conspiracy was the use of the mails, and such use of the mails when proved became an integral part of the conspiracy, and therefore the conspirators were violating the law by sending such responses through the mails.

Therefore, we respectfully submit that the instructions of the court covered the requested instructions of appellants in every material respect, and that they were in entire uniformity with the rules of test or decoy letters laid down in the cases hereinbefore cited.

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